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NO. 90-1658

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HBA EAST LIMITED, ET AL,
Petitioners

v.

JEA BOXING COMPANY, ET AL,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT CONCERNING CORPORATE RESPONDENTS

The Respondents in this case are (1) JEA Boxing Company, Inc. and (2) Pine Hill Investments, Inc., d/b/a Houston Boxing Association. Neither Respondent has any parent or subsidiary companies.

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JURISDICTION

Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1257(a). This Court, however, has no jurisdiction of Petitioners' constitutional complaint because Petitioners waived that complaint in the Texas state court system. As the Court of Appeals for the First District of Texas held, Petitioners waived their point of error complaining that lack of notice of the default judgment hearing violated their due process rights under the Fourteenth Amendment to the United States Constitution by "fail[ing] to urge this point of error before the trial court in their motion for new trial" as required by Texas Rule of Ap-

pellate Procedure 52(a). Pet. App. B at B-11. In denying Petitioners' Application for Writ of Error, the Supreme Court declined to review the court of appeals' holding. Pet. App. A.

Because Petitioners' federal claim was not adequately presented in the state court system, this Court has no jurisdiction to consider that claim now. *See* p. 12-18, *infra*.

STATEMENT OF THE CASE

Respondents filed their Original Petition on March 3, 1987 in Texas state court alleging that Petitioners bilked them out of millions of dollars through a series of wrongful acts, including breaches of fiduciary duty, breaches of partnership agreements, diversion of business opportunities, tortious interference with contract, and fraud. Respondents claimed that Petitioners swindled them in connection with various transactions and sought, among other things, dissolution of the partnership with Petitioners, all rights and interest in the partnership's assets, and actual and punitive damages. Pet. App. E.

All Petitioners were served with this lawsuit by March 6, 1987. *See* Petition for a Writ of Certiorari to the Supreme Court of the State of Texas at 3 (hereinafter "Petitioners' Brief at ____"). Yet for some two years after Respondents filed suit, Petitioners managed to dodge Respondents' claims in the trial court by flagrantly abusing the judicial system. Shortly before Petitioners' answers were due, three of the Petitioners filed bankruptcy petitions in New York. The New York court dismissed the bankruptcy action as having been filed in bad faith. Undaunted, Petitioners continued their efforts to avoid the Texas judicial system by asking the bankruptcy judge to transfer the case to a federal district court in New York, by filing

parallel proceedings in New York state court and removing the Texas action to federal court. All of Petitioners' procedural machinations came to naught: the bankruptcy judge refused to transfer the action, the New York state court dismissed the parallel proceeding, and the Texas federal district court remanded the case to state court.

Nine months after this case had been remanded to state court and two years after Petitioners had been properly served with process in the state court proceeding, Petitioners still had not filed answers. Accordingly, on April 1, 1989, the state court entered a default judgment against all Petitioners. Petitioners appealed, and the court of appeals affirmed as to the Petitioners that had not filed bankruptcy, but reversed as to the Petitioners that had filed bankruptcy. Pet. App. B. The Texas Supreme Court denied Petitioners' Application for Writ of Error. Pet. App. A.

A. Petitioners' Bad Faith Bankruptcy

On March 27, 1987, three days before Petitioners' answers were due in the Harris County District Court in Houston, Texas, three of the Petitioners (i.e., HBA East, Inc., Round One Productions, Inc., and Levine), filed Petitions for Chapter 11 bankruptcy reorganization in the Eastern District of New York. By filing the bankruptcy proceedings, the Bankruptcy Petitioners were able to invoke the "automatic stay" provision of the Federal Bankruptcy Code, 11 U.S.C. § 362, so as to avoid answering in the Texas state court action. Petitioners were represented in the bankruptcy by the Kaye, Scholer law firm of New York, New York. The remaining three Petitioners, HBA East, Ltd., Ring Network, Inc., and Ring Sports Promotions, Inc., did not file petitions in bankruptcy, but

neither did they file answers in the Harris County District Court.[1]

On April 24, 1987, Respondents instituted adversary proceedings in the New York bankruptcy court, re-alleging in that forum the same state law claims that they had asserted in the Texas state court action. Respondents also moved to dismiss the bankruptcy action as having been filed in bad faith. Judge Jerome Feller, United States Bankruptcy Judge, required Petitioner HBA East, Inc. to place existing funds totalling $175,000 in escrow pending further orders of the court. After holding four extensive evidentiary hearings, Judge Feller dismissed the bankruptcy action as having been filed in bad faith, declaring:

> The filing of the [bankruptcy] petitions on March 27, 1987 was *strategically timed and calibrated to events in Texas*. . . . By filing on the eve of their *answering date in the Texas Action* and not before, the Debtors were able to use the automatic stay as a sword to *avoid appearing in that lawsuit*, and were able to shift the forum of their disputes with Movants to this Court, a forum they believed might be more favorable to their plight. As a general rule where, as here, the timing of a filing of a Chapter 11 petition is such that there can be no doubt that the primary, if not sole, purpose of the filing was a *litigation tactic*, the petition may be dismissed as *not being filed in good faith*.
>
> * * *
>
> Where, as here, the totality of facts and circumstances rise to a level of egregiousness compelling a conclusion that the reorganization process is being

1. HBA East, Inc., Round One Productions, Inc., and Levine will at times be referred to as the "Bankruptcy Petitioners" and HBA East, Ltd., Ring Network, Inc. and Ring Sports Promotions, Inc. will at times be referred to as the "Non-Bankruptcy Petitioners."

> perverted, we are constrained to dismiss the Chapter 11 petitions as not being filed and maintained in good faith.

App. A at A-3-A-4. (emphasis added) (footnotes omitted). Excerpts from Judge Feller's bankruptcy decision are attached hereto as App A.

B. Petitioners' Attempt to Transfer the Case to the New York Federal and State Courts

On June 17, 1988, two weeks after Judge Feller dismissed the bankruptcy action, the Bankruptcy Petitioners moved Judge Feller to transfer the adversary portion of the proceeding from the bankruptcy court to the United States District Court for the Eastern District of New York. Judge Feller denied that motion on June 23, 1988, noting the absence of any legal authority empowering a bankruptcy judge to order a transfer. App. B at B-10-B-11. Excerpts from the record relevant to Petitioners' attempt to transfer the case to the New York federal and New York state courts are attached hereto as App. B. Chastising the Bankruptcy Petitioners for filing their frivolous motion to transfer, Judge Feller reminded them that their bankruptcy action had been found "to be a misuse and abuse of the bankruptcy reorganization process" and that their bankruptcy action was "dismissed as not being filed in good faith." App. B at B-11.

On June 30, 1988, one week after Judge Feller denied the Bankruptcy Petitioners' motion to transfer their bankruptcy action to a New York federal court, Petitioners filed an action against Respondents in New York state court. On Respondents' motion, the New York state court later dismissed the action, holding that it was merely an attempt to litigate matters already pending in the Texas state court action. App. B.

C. Petitioners' Attempted Removal of the Case to Texas Federal Court in Houston, Texas

Meanwhile, instead of answering in the Texas state court litigation after Judge Feller dismissed the bad faith bankruptcy on June 3, 1987, Petitioners retained Texas attorney Michael Caddell to remove the case to a Texas federal court. On June 27, 1988 (nearly 30 days after dismissal of the bankruptcy and the lifting of the automatic stay), Petitioners removed the Texas state action to federal court. Pet. App. F. On June 29, 1988, Federal Judge Lynn Hughes held an in-chambers conference with the parties during which Respondents' motion to remand was argued. App. C at C-3. A copy of Judge Hughes' docket sheet is attached hereto as App. C. Representing Petitioners were (1) Kaye, Scholer attorneys, who had represented Petitioners in the New York bankruptcy and were included in the conference by telephone, and (2) Texas attorney Michael Caddell. Pet. App. O. During the conference, Judge Hughes ordered the case to be remanded.

D. Petitioners' Notice of the Texas Federal Court's Remand Order

On June 30, 1988, Judge Hughes signed an Order remanding the case to the Harris County District Court. Pet. App. G. Although Petitioners insist that they "never received written notice that the remand order had been filed in Harris County," (Petitioners' Brief at 3), the truth is that Petitioners, by virtue of participating in the remand hearing, had immediate notice of the remand, and that Texas attorney Michael Caddell was notified of the remand Order by the Federal court clerk. App. C at C-2.

Before signing the remand Order, Judge Hughes directed that the $175,000 in escrow in New York be deposited in the registry of Judge Hughes' court. Although Petitioners assert that they deposited the $175,000 in the federal court's registry (Petitioners' Brief at 3), the truth is that Petitioners' New York bankruptcy counsel Kaye, Scholer filed an interpleader proceeding in New York federal court on July 1, 1988, and deposited the $175,000 in that New York interpleader action.

In response to the interpleader action, Respondents filed a motion in Judge Hughes' court to hold Petitioners in contempt for disregarding Judge Hughes' Order to deposit the funds in the registry of Judge Hughes' court. In their written oppositions to Respondents' contempt motion, Kaye, Scholer and attorney Caddell argued that the June 30, 1988 remand Order "divested the Court [Judge Hughes] of all jurisdiction over the case" and that "[b]y prior Order, this case was remanded to the 157th Judicial District Court for Harris County, Texas. . . ." App. D. Excerpts from Kaye, Scholer's and Mr. Caddell's written oppositions to Respondents' contempt motion are attached hereto as App. D.

Furthermore, in a hearing on the motion for contempt before Judge Hughes on July 8, 1988, Mr. Caddell repeatedly argued that because the case had been remanded to Texas state court, Judge Hughes lacked jurisdiction to hear the motion on contempt.

> Judge Hughes: I haven't signed the remand order, have I?
>
> Mr. Caddell: Yes. You signed it on June 30 [1988], which remanded the case to state court.

App. E at E-2 - E-3. A copy of the relevant portions of the July 8, 1988 hearing before federal Judge Hughes is attached hereto as App. E. Thus, as of the July 8, 1988 contempt hearing, Petitioners were clearly aware that the case had been remanded to state court.

Judge Hughes held that he had jurisdiction to find Petitioners and Kaye, Scholer in contempt for disobeying his Order to transfer funds to his court. App. E at E-4. As Judge Hughes stated:

> I am convinced I still have jurisdiction to keep *your bandits* from running off with the money.
>
> I don't think there is the slightest doubt that I have authority to freeze control of the [res] while the *bad faith meritless machinations of your clients are returned to their proper home.* . . .
>
> [Judge Feller] knew a *skunk* when he saw one, and we are just as street wise as they are in Brooklyn.
>
> [Petitioners] . . . had no intention of complying [with Judge Hughes' Order] without trying to come up with some *other gimmick*. They don't want to litigate the merits.

Id. (emphasis added). It was not until after the July 8, 1988 contempt hearing that Petitioners finally deposited the $175,000 in the registry of Judge Hughes' court.

By letter dated July 19, 1988, Judge Hughes advised Judge Salazar, the Harris County District Court Judge, that the $175,000 would be transferred to the registry of the state court. Recognizing the effectiveness of the remand, Judge Hughes wrote to Judge Salazar as follows:

> *Now that the case is again fully pending before you,* it appears to me that the sensible thing is for me to

> transfer the $175,000 plus interest I hold in the registry to your registry.

App. F. (emphasis added). A copy of the letter from Judge Hughes to Judge Salazar is attached to this brief as App. F. By sending a copy of this letter to Mr. Caddell, Judge Hughes himself gave Petitioners' trial counsel written notice of the remand of the case to the state court.

E. The Default Judgment

Despite these repeated notices to Petitioners of Judge Hughes' remand Order, Petitioners still failed to answer or appear in the Texas action. Accordingly, the trial court entered a default judgment against all Petitioners on April 1, 1989, nine months after this case had been remanded to the state court and two years after Petitioners had been properly served in the Texas state action. The Judgment awarded Respondents, jointly and severally, $2,215,595 in actual damages, $6,645,785 in punitive damages, and post-judgment interest, along with the $175,000 plus interest which had been on deposit in the federal court's registry. The Judgment also provided for the dissolution of the partnership upon which Respondents' underlying lawsuit was based, and awarded Respondents all rights and interest to the partnership assets. Pet. App. C. The Judgment, however, incorrectly stated that Petitioners had appeared in the case. Pet. App. C at C-1.

F. Petitioners Failed to Complain of Lack of Notice Until They Filed Their Amended Brief with the Court of Appeals

On April 28, 1989, Petitioners filed their Motion for New Trial; that motion was denied on May 10, 1989.

Petitioners' *sole complaint* before the trial court was that the Judgment was defective because Petitioners' answers were not due pursuant to Rule 237a of the Texas Rules of Civil Procedure. Pet App. H at H-1 - H-3. On August 25, 1989, Petitioners filed their appeal bond and appellate brief with the court of appeals, asserting only those points of error that they had raised in their Motion for New Trial. Pet App. J. In fact, Petitioners did not raise their present constitutional complaint until they filed an amended brief with the court of appeals on October 2, 1989. Petitioners' Brief at 5; Pet. App. K at K-8, K-11 - K-12.

The court of appeals affirmed the default judgment entered against the *Non-Bankruptcy Petitioners* and correctly held that they had waived any constitutional complaint that they might have had concerning lack of notice of the hearing on the default judgment by failing to raise that complaint in the trial court.

Because the court of appeals concluded that it had to reverse the Judgment against the *Bankruptcy Petitioners* on other grounds anyway, the court declined to consider whether the *Bankruptcy Petitioners* had also waived their constitutional complaint concerning lack of notice. Pet. App. B at B-11.

The court held that because the Bankruptcy Petitioners' answer was not yet due when the Judgment was rendered, the Judgment was invalid as to them. *Id.* Although the court refused to reach the issue of whether the Bankruptcy Petitioners had waived their constitutional rights, the court's analysis concerning the Non-Bankruptcy Petitioners' waiver of their constitutional claims applies with equal force to the waiver of constitutional claims by the Bankruptcy Petitioners.

By denying writ, the Texas Supreme Court declined to review the court of appeals' decision. Pet. App. A.

REASONS FOR DENYING THE WRIT

Petitioners present three questions for this Court's review. The first question simply inquires whether failure to give notice of a default judgment hearing violates a defendant's right to due process under the Fourteenth Amendment to the United States Constitution once the defendant has made an appearance in the case. Petitioners' Brief at i. Respondents do not dispute that the answer to that question is yes.

Petitioners' second question asks whether the right to complain of a due process violation can be waived by a Texas defendant before the Texas Supreme Court, following a United States Supreme Court's decision, holds that the right to due process is available to that defendant under the precise circumstances at issue in this case. *Id.* In presenting this question, Petitioners assume the burden of demonstrating that the Texas Supreme Court decision, upon which Petitioners rely, made new law. Petitioners cannot meet that burden; hence, Petitioners waived their due process complaint by failing to present that complaint to the trial court.

Petitioners' third question asks whether Petitioners appeared in this case. *Id.* In presenting this question, Petitioners assume the burden of demonstrating that they made a pre-default appearance in this case. Because the right to notice of a default judgment hearing applies only to defendants *who have appeared* in an action, unless Petitioners can show that they appeared in the Texas state court action before the default judgment hearing, then

Petitioners were not entitled to notice of that hearing. Petitioners cannot meet that burden because they filed no answer to the Texas state court action and made no other appearance in the Texas state action before the default judgment hearing.

A. This Court Has No Jurisdiction to Consider Petitioners' Constitutional Complaint Because Petitioners Failed to Present that Complaint to the Trial Court

Petitioners assert that this Court has jurisdiction to issue Petitioners a Writ of Certiorari to the Texas Supreme Court pursuant to 28 U.S.C. § 1257(a). Petitioners' Brief at 2. This Court, however, will not review a final judgment of a state court pursuant to that statute unless "the record . . . shows . . . that the federal claim was adequately presented in the state system." *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) (quoting *Webb v. Webb*, 451 U.S. 493, 496-97 (1981)). This Court has no jurisdiction to decide a federal constitutional issue which was not properly preserved in the state court system. Thus, in order to maintain jurisdiction on the ground that a state court has denied a federal right, the right

> must not only be specially set up or claimed, but at the proper time and in the proper way. The proper time is in the trial court whenever that is required by the state pratice, in accordance with which the highest court of a State will not revise the judgment of the court below on questions not therein raised.

Mutual Life Ins. Co. v. McGrew, 188 U.S. 291, 308 (1903).

Where, as here, the Texas court of appeals refused to hear Petitioners' constitutional claim because that claim was not presented to the trial court and was instead raised for the first time before the court of appeals, this Court has no jurisdiction to decide that delinquently-raised claim. *Exxon Corp. of Eagerton*, 462 U.S. 176, 181 n.3 (1983) (holding that this Court had no jurisdiction to hear constitutional claim not presented to the Alabama trial court but presented for the first time on appeal). *See also Board of Directors of Rotary Int'l*, 481 U.S. at 550.

B. Pursuant to Texas Appellate Practice, Petitioners Waived Their Due Process Complaint.

Petitioners concede that they did not urge their due process complaint (i.e., that the default judgment should be set aside because Petitioners received no notice of the default judgment hearing) in the trial court and they asserted that complaint for the first time in an amended brief filed with the court of appeals on October 2, 1989. Petitioners' Brief at 4; Pet. App. K. They insist, however, that no waiver occurred because their constitutional complaint was allegedly based upon a new rule of law announced by the Texas Supreme Court on September 20, 1989, *after* Petitioners filed their Motion for New Trial on April 28, 1989 and *after* Petitioners filed their first appellate brief with the court of appeals on August 25, 1989. Petitioners' Brief at 4. According to Petitioners, the Texas Supreme Court established a new constitutional right to notice of default judgment proceedings in *LBL Oil Co. v. International Power Services, Inc.*, 777 S.W.2d 390 (Tex. 1989). Petitioners' Brief at 4.

Petitioners' tardy assertion of purported constitutional error came too late for appellate consideration. First,

Petitioners state that their new-found constitutional complaint is based solely on the recent Texas Supreme Court decision in *LBL Oil*. But *LBL Oil* did not address the timeliness of the constitutional challenge. The defaulted defendants in *LBL Oil*, unlike Petitioners here, appealed by writ of error to the court of appeals,[2] and therefore, could timely urge the constitutional challenge for the first time on appeal. This case, unlike *LBL Oil*, involves a direct appeal and not an appeal by writ of error. Second, contrary to Petitioners' assertions, *LBL Oil* did not create any new rights; the decision merely confirmed what had long been the law in Texas. See p. 16-18 *infra*.

Well-settled Texas law is clear that "[i]n order to preserve a complaint for appellate review, a party must have presented to the trial court a timely motion, *stating the specific grounds* for the ruling that it desired the court to make, and must have obtained a ruling on its motion. TEX R. APP. P. 52(a)." *Mark Products U.S. Inc. v. Inter-First Bank Houston, N.A.*, 737 S.W.2d 389, 396 (Tex. App.—Houston [14th Dist.] 1987, writ denied) (emphasis added). *See also St. Gelais v. Jackson*, 769 S.W.2d 249, 251 (Tex. App.—Houston [14th Dist.] 1988, no writ); *Fish v. Bannister*, 759 S.W.2d 714, 722 (Tex. App. —San Antonio 1988, no writ); *Notgrass v. Equilease Corp.*, 666 S.W.2d 635, 637 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

Nor is the waiver analysis altered because the complaint in question asserts a violation of constitutional due process rights. The waiver principle is equally applicable to delinquently asserted constitutional complaints: it is set-

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2. One of the prerequisites for a writ of error under Texas law is that a party bringing that Writ of Error must not have participated in the trial proceedings. TEX. R. APP. P. 45(b).

tled law that "[a] litigant by his act or failure to act, may waive a constsitutional right . . . ." *Mercer v. Philips Nat'l Gas Co.*, 746 S.W.2d 933, 936 (Tex. App.—Austin 1988, writ denied). *See Curtis Publishing Co. v. Butts*, 388 U.S. 130, 143 (1967) (even a constitutional objection is waived by failing to raise it at a proper time in the state court).

Where a constitutional challenge is not presented to the trial court, the appellate court "will not consider it for the first time on appeal." *Elbar Inc. v. Claussen*, 774 S.W.2d 45, 53 (Tex. App.—Dallas 1989, no writ). *See Doctor's Hosp. v. West*, 765 S.W.2d 812, 815 (Tex. App. —Houston [1st Dist.] 1988, no writ) (due process violation not properly before appellate court where not urged to trial court); *Walker v. Employees Retirement System*, 753 S.W.2d 796, 798 (Tex. App.—Austin 1988, writ denied) ("[a] constitutional challenge not raised properly in the trial court is waived on appeal"); *Zaragosa v. State*, 721 S.W.2d 429, 429 (Tex. App.—Corpus Christi 1986, no writ) ("[f]ailure to object or otherwise apprise the trial court of one's claim waives even constitional error").

What happened here is clear. Petitioners discovered a new ground of purported constitutional error based upon reading a recent decision of the Texas Supreme Court in which another litigant in another case had timely urged a constitutional complaint. This discovery was made after the case was already pending before the court of appeals. If Petitioners—all of whom have admitted they were properly served with process—had a legitimate constitutional challenge to the default judgment entered in this case, they relinquished their complaint when they failed to bring that challenge to the attention of the trial court.

C. *LBL Oil* Did Not Make New Law

According to Petitioners, they did not have to apprise the trial court of their constitutional challenge because that challenge was based upon a new rule of law established by the Texas Supreme Court in *LBL Oil* after the trial court's jurisdiction had expired. Petitioners' Brief at 4-5, 9-10. But the Texas Supreme Court's decision in *LBL Oil* did not announce any new rule of law. For at least twenty-five years, Texas courts have recognized that a defendant who has appeared in a lawsuit must be given notice before default.

In *Investors Diversified Services, Inc. v. Brunner,* 366 S.W.2d 810 (Tex. Civ. App.—Houston 1963, writ ref'd n.r.e.), the court of appeals rejected the defendant's contention that a letter in the court's file constituted an answer, but in doing so, the court noted:

> If the letter in question can be construed as an answer or appearance . . . the garnishment proceeding should have been set for trial as a contested case and *notice given* as in other cases . . . *before taking a default judgment.*

Id. at 815 (emphasis added).

A simple reading of the *LBL Oil* decision itself also demonstrates that the Texas Supreme Court was *not* making new law. In a short *per curiam* opinion written without oral argument, the Texas Supreme Court reversed a default judgment in express reliance on two 1988 cases holding that a defendant has a constitutional right to notice of a trial setting. In *Peralta v. Heights Medical Center,* 485 U.S. 80, 84 (1988), this Court held that a defendant has a constitutional due process right to notice of a trial setting, and the Texas Supreme Court likewise

so held in *Lopez v. Lopez*, 757 S.W.2d 721, 723 (Tex. 1988).

Based on the *Peralta* and the *Lopez* decisions, the *LBL Oil* Court stated:

> Once a defendant has made an appearance in a cause, he is entitled to notice of the trial setting as a matter of due process under the Fourteenth Amendment to the Federal Constitution as set forth in *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 . . . (1988). *See Lopez v. Lopez*, 757 S.W.2d 721, 723 (Tex. 1988). The record here establishes that [defendant] had no actual or constructive notice of the hearing on the motion for default judgment, which effectively was his trial setting since it was dispositive of the case.

777 S.W.2d at 390-91.

In stating further that "[t]he decision of the court of appeals affirming the judgment is in conflict with *Peralta* and *Lopez*," the Texas Supreme Court clearly recognized that *Peralta* and *Lopez* established the applicable rule of law that was controlling in *LBL Oil*, 777 S.W.2d at 391. The *Peralta* and *Lopez* cases were decided *over one year before* Petitioners filed their Motion for New Trial in this case. Thus, Petitioners' claim that *LBL Oil* established new law is simply wrong.

Because *LBL Oil* merely followed established law, Petitioners' delinquently asserted complaint about lack of notice was not preserved for review by Texas appellate courts. Thus, the court of appeals correctly found that the Non-Bankruptcy Petitioners had waived their constitutional complaints. Pet. App. B at B-11. The Texas Supreme Court, in denying Petitioners' Application for Writ of Error, declined to review the court of appeals' holding. Pet. App. A.

Accordingly, there is no need for this Court to reach the question whether Petitioners appeared in the trial court before the entry of default and were therefore entitled to notice of the default judgment. But if this Court does consider that issue, it should conclude that Petitioners had not appeared in the court below at the time that the default judgment was entered.

D. There Was No Pre-Default Appearance in This Case.

Under *LBL Oil*, a defendant is only entitled to notice of a default judgment hearing if the defendant has appeared in the lawsuit. 777 S.W.2d at 390-91. In the present case, it is undisputed that Petitioners did not file answers before the entry of default. Petitioners claim, however, that because the default judgment recited that Petitioners appeared in the action, Respondents are bound by that recital because Respondents failed to object to the recital and failed to appeal that aspect of the Judgment. Petitioners' Brief at 10. Petitioners claim further that the "record demonstrates that Petitioners did, in fact appear." Petitioners' Brief at 11. Petitioners are wrong on both counts.

1. Petitioner's Waiver Arguments Puts the Cart Before the Horse: It Is Petitioners' Waiver—Not Respondents'—That Is at Issue.

With respect to Petitioners' claim that Respondents waived their contention (or are estopped to contend) that Petitioners did *not* make an appearance because the Judgment recited that Petitioners appeared, it is clear that Petitioners' argument puts the cart before the horse. It is Petitioners who waived their complaint of lack of notice

based on an alleged appearance by failing to complain of the lack of notice in their new trial motion. Had Petitioners complained in their new trial motion that their "appearance" constitutionally entitled them to notice before default, then Respondents would have had an opportunity in the trial court to seek a correction of the erroneous recitation in the Judgment stating that Petitioners appeared. Had Respondents been alerted to the possibility that the language in question might be viewed as more than inconsequential surplusage, Respondents could have, as late as thirty days after the overruling of Petitioners' Motion for New Trial, moved to reform the judgment to delete the inaccurate statement that Petitioners made an appearance. *See Emerson v. Fires Out, Inc.*, 735 S.W.2d 492, 494 (Tex. App.—Austin 1987, no writ). Petitioners are the ones who waived their complaint and are judicially estopped to assert that their purported "appearance" constitutionally entitled them to notice of the motion for default.

2. The Letter Written by Mr. Steinberg Was Not an Appearance.

Petitioners contend that a letter written by Arthur Steinberg, a New York lawyer, to Judge Salazar's clerk in the Harris County District Court constituted an appearance. Petitioners' Brief at 11; Pet. App. N. That letter, however, does not constitute an appearance for a number of reasons. *First,* letters to a court do not, as a general rule, constitute an appearance. *See Pinkston v. Farmers State Bank,* 210 S.W.2d 595 (Tex. Civ. App.—Beaumont 1947, no writ) (telegram to judge not an appearance); *Investors Diversified Services, Inc. v. Brunner,* 366 S.W.2d 810, 815 (Tex. Civ. App.—Houston 1963, writ ref'd n.r.e.) (letter to clerk not an appearance).

Second, in order for Mr. Steinberg's letter to constitute an appearance it must have sought an adjudication by the court. As *Investors Diversified Services, Inc. v. Bruner* held, "[i]n order for an act of the defendant to constitute an appearance . . . it must seek a judgment or an adjudication by the court on the same question." 366 S.W.2d at 815. Although a defendant's act "may have some relation to the cause, it does not constitute a general appearance if it in no way recognizes that the cause is properly pending or that the court has jurisdiction, and no affirmative action is sought from the court." *Id. See also United Nat'l Bank v. Travel Music of San Antonio, Inc.,* 737 S.W.2d 30, 33 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.) (defendant's letter to state court's clerk not an appearance because it sought no adjudication by the court).

As the very cases cited by Petitioners (Petitioners' Brief at 12-13) make clear, in order to constitute an appearance, a defendant's conduct must "in some manner indicate[] his intention to submit his person and cause to the jurisdiction of the court." *Toler v. Travis Cty. Child Welfare Unit,* 520 S.W.2d 834, 836 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.). And as *Smith v. Amarillo Hosp. Dist.,* 672 S.W.2d 615, 617 (Tex. App.—Amarillo 1984, no writ) teaches, "the nature and quality of the [defendant's] activities must be examined" to determine whether his conduct constitutes an appearance.

Petitioners, well acquainted with the principles, want this Court to believe that Mr. Steinberg's letter sought an adjudication of this case from the Texas state court. Thus, Petitioners tell this Court that Mr. Steinberg's letter (1) requested that the New York bankruptcy court pleadings, including the answer, be deemed "the duly filed

pleadings" of the parties in the Texas state court; (2) requested "that there be a prompt adjudication of the underlying claims asserted by the parties hereto;" and (3) requested to be advised "of the approaches it deemed advisable 'in order to achieve . . . the foregoing action.'" Petitioners' Brief at 11. Petitioners totally misconstrue Mr. Steinberg's letter.

Mr. Steinberg's letter did not ask the Texas state court to deem the New York bankruptcy pleadings "duly filed" in the Texas state court in order to seek an adjudication from the Texas court. Rather, Mr. Steinberg asked the Texas state court, in the event the New York Bankruptcy court determined not to transfer the case to the New York federal court, to deem the letter "a request for the removal of the Texas Action to the federal district court and that all pleadings filed in the New York Proceeding, including the Answer, be deemed the duly filed pleadings of the parties in the Texas Action." Pet. App. N at N-3. Thus, it is clear that Mr. Steinberg requested Judge Salazar's clerk to deem the New York bankruptcy pleadings "duly filed" in the Texas state court solely to affect a removal of the cause to a Texas federal court if Petitioners were unable to get the New York bankruptcy action transferred to a New York federal court.[3]

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3. Moreover, an improper removal does not constitute an appearance. *Employers Reinsurance Corp. v. Bryant,* 299 U.S. 374, 376 (1937) ("[o]btaining the removal from the state court into the federal court did not operate as a general appearance by the defendant"); *Enserch Int'l Exploration, Inc. v. Attock Oil Co.,* 656 F. Supp. 1162, 1167 n.16 (N.D. Tex. 1987) (removal does not constitute a general appearance); *Curry v. Dell Publishing Co.,* 438 S.W.2d 887, 890 (Tex. Civ. App.—El Paso 1969, writ ref'd n.r.e.), *overruled on other grounds, Kawasaki Steel Corp. v. Middleton,* 699 S.W.2d 199, 202 (Tex. 1985) ("there was no appearance of defendant in State Court because, upon the filing of the Petition for Removal with accompanying bond, the State Court was divested of jurisdiction").

Furthermore, Mr. Steinberg's letter did not ask the Texas state court promptly to adjudicate the underlying merits of the case. Instead, Mr. Steinberg used the language referring to "a prompt adjudication of the underlying claims asserted by the parties" merely to express his "hope" that Judge Salazar and Respondents would "recognize" that "[s]ignificant judicial economics can be achieved by continuing the New York Proceeding in the Federal District Court of New York." *Id.* Thus, Mr. Steinberg wanted both Respondents and Judge Salazar to "recognize" that only by continuing the New York state action in a New York federal court could there "be a prompt adjudication of the underlying claims of the parties hereto." *Id.*

Finally, Mr. Steinberg did not ask the Texas state court to inform him of approaches the court thought advisable as a method of seeking an adjudication in the Texas state court. Rather, his letter merely asked the Texas court to inform him if a "different approach be deemed more advisable" to achieve "*any* of the foregoing actions." *Id.* (emphasis added). By leaving out the "any" in the quoted language, Petitioners attempt to persuade this Court that Mr. Steinberg's game plan was to get the New York bankruptcy pleadings filed in the Texas court in order promptly to adjudicate the parties' claims in the Texas court. The truth is, however, that the entire thrust of Mr. Steinberg's letter was *to avoid* having to try this case in a Texas state court; i.e., Mr. Steinberg wrote Judge Salazar's clerk to apprise the Texas court of Petitioners' intention to have the New York bankruptcy proceedings removed to a New York federal court or, alternatively, to have the Texas proceedings removed to a Texas federal court. *Id.*

3. Neither Mr. Steinberg's Letter Nor His Participation by Telephone in a Later Motion Hearing Was an Appearance Because Mr. Steinberg Is Not Authorized to Practice Law in Texas.

Mr. Steinberg is not authorized to practice law in Texas. A copy of the certification from the Texas Supreme Court stating that he is not authorized to practice law in Texas is attached to this brief as App. G. Nor is he an officer or employee of any of the Petitioners' Corporations. Therefore, he could not enter an appearance by his letter because an appearance not made in open court must be made by the party itself or by an "attorney of the court." TEX. R. CIV. P. 7.[4] Since Mr. Seinberg's letter was not written by a party or an attorney of the court, it could not have constituted an appearance. *See Gonzales v. Gutierrez*, 694 S.W.2d 384, 389 (Tex. App.—San Antonio 1985, no writ) (appearance by city attorney on behalf of airport director in his official capacity on behalf of mayor in his official capacity was not an appearance by the city and did not bind city; moreover, at no time did city attorney indicate that city was making an appearance). Similarly, Mr. Steinberg's telephone call to Judge Hughes, sitting not in the Texas state court but in a Texas federal court, did not constitute an appearance in the Texas court because Mr. Steinberg is not licensed to practice law in Texas.

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4. Under TEX. R. CIV. P. 120, an appearance may be made "in open court" by an authorized agent of a party. The letter in question clearly does not constitute an appearance in open court. Therefore, Rule 120 is inapplicable.

4. Neither Petitioners' Participation in Motion Hearings Nor Their Filing of Responses to Respondents' Motions Constituted an Appearance.

Petitioners argue that they appeared in this action by participating in motion hearings in federal court and through the filing of responses to Respondents' motions. Petitioners' Brief at 11-12. They point out that on June 29, 1988, Mr. Steinberg participated by telephone in an in-chambers conference conducted by federal Judge Hughes in connection with Respondents' remand motion, and further point out that Texas attorney Michael Caddell attended the oral hearing held by federal Judge Hughes in connection with Respondents' motion for sanctions, emphasizing that Mr. Caddell filed a written response to that motion in a federal court. *Id.*

a. Mr. Steinberg's Telephone Conference with Judge Hughes in the Show Cause Hearing Was Not an Appearance.

Mr. Steinberg's participation by telephone in the show cause hearing on Respondents' motion for contempt before Judge Hughes in a Texas federal court was not an appearance in the Texas state court lawsuit. Even if actions taken in federal court proceedings could be deemed actions taken in state court proceedings—which they cannot—Texas law is clear that an appearance in response to a motion "is an appearance to the motion only and is not a general appearance subjecting defendant to the court's jurisdiction generally." *Green v. Green,* 424 S.W.2d 479, 481 (Tex. Civ. App.—Tyler 1968, no writ). *See also Turner v. Turner,* 576 S.W.2d 452, 454 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ); *Gibson*

v. State, 288 S.W.2d 577, 578 (Tex. Civ. App.—Waco 1956, writ dism'd). Furthermore, Mr. Steinberg's participation in the show cause hearing did not constitute an appearance in the main suit because an appearance, "required by the terms of [a] show cause order, to contest an interlocutory motion is an appearance to the motion only and is not a general appearance subjecting [the Respondent] to the court's jurisdiction generally." *Green,* 424 S.W.2d at 481. *See also Turner,* 576 S.W.2d at 454; *Gibson,* 282 S.W.2d at 578.

b. Mr. Caddell's Presence at the Show Cause Hearing Before Judge Hughes Was Not an Appearance.

For the same reasons that Mr. Steinberg's telephone call to Judge Hughes did not constitute an appearance, Mr. Caddell's signed response to Respondents' Order to Show Cause and his appearance at Judge Hughes' hearing in federal court on that matter did not constitute an appearance in the Texas state court action.

5. Mr. Caddell's Informal Communications with Judge Salazar About a Texas State Court Hearing Was Not an Appearance.

Petitioners imply that Mr. Caddell's comment to federal Judge Hughes "that he [Mr. Caddell] had previously spoken to Judge Salazar about a hearing in state court," constituted an appearance. Petitioners' Brief at 12. Petitioners' contention that a casual chat that Mr. Caddell had with Judge Salazar concerning a hearing in the Texas state court action constituted an appearance in that action is ludicrous. Texas law is clear that informal approaches to a trial court are not formal appearances. *See Perez*

Bustillo v. State, 718 S.W.2d 344, 848 (Tex. App.—Corpus Christi 1986, no writ) (defendants' informal approach to trial court did not constitute an appearance).

CONCLUSION

Petitioners failed to preserve their complaint that lack of notice of the hearing on the default judgment violated their Fourteenth Amendment right to due process as enunciated in *Peralta,* 485 U.S. at 99 and in *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950). For that reason alone the petition for writ of certiorari should be denied. The petition should also be denied because Petitioners, having failed to answer or to appear in any other way in the Texas state court action, were not entitled to notice of the hearing on the default judgment; hence, Petitioners' constitutional right to due process was not violated.

Respectfully submitted,

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May 23, 1991

APPENDIX A

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

Chapter 11

Case No. 187-70557-353

In Re: HBA EAST, INC.,
ROUND ONE PRODUCTIONS, INC.,
JEFFREY D. LEVINE,
Debtors.

DECISION AND ORDER ON MOTION TO DISMISS CHAPTER 11 CASES

JEROME FELLER
United States Brankruptcy Judge

APPEARANCES:

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PLAINTIFF'S EXHIBIT 10

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. . . conglomerate of factors rather than on any single datum."

These guidelines, insofar as here applicable, require consideration of the following: i) whether the Debtors filed their Chapter 11 petitions as a tactic to obtain a litigation advantage, ii) whether the Debtors' reorganization effort is essentially a two party dispute, iii) the nature and extent of the Debtors' assets, debts and business operations and iv) whether there is a reasonable probability that a reorganization plan can be proposed and confirmed.

The filing of the Debtors' Chapter 11 petitions on March 27, 1987 was strategically timed and calibrated to events in Texas. A period of approximately three months had elapsed since the complete breakdown of the Abercrombie-Levine business relationship and concomitant termination of funding the Debtors' operations. Movants had taken concrete steps to cure or mitigate their alleged hurt arising out of that relationship, the most significant of which was commencement of the Texas Action on March 3, 1987. By filing on the eve of their answering date in the Texas Action and not before, the Debtors were able to use the automatic stay as a sword to avoid appearing in that lawsuit, and were able to shift the forum of their disputes with Movants to this Court, a forum they believed might be more favorable to their plight.[27] As a general rule where, as here, the timing of the filing of a Chapter 11 petition is such that there can be no doubt that the primary, if not sole, purpose of the filing was a litigation tactic, the petition may be dismissed as not being filed in good faith. *Furness v. Lilienfield, supra; In re Karum* . . .

* * *

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* * *

. . . to "reorganize" the disagreements with Movants. There are hardly any other creditors apart from Movants and there is no evidence that even such other creditors are clamoring for payment. The Debtors' one man business operation is highly speculative and the assets are disputed. There is virtually no money to run the business, no cognizable assets to fund a plan of reorganization and no realistic probability of a successful reorganization. Where, as here, the totality of facts and circumstances rise to a level of egregiousness compelling a conclusion that the reorganization process is being perverted, we are constrained to dismiss the Chapter 11 petitions as not being filed and maintained in good faith.

The Debtors further argue that they properly filed their Chapter 11 petitions to obtain the much needed protection of a breathing spell provided by the automatic stay contained in 11 U.S.C. § 362(a) as against Movants. This argument is fallacious. The protection of the automatic stay is not *per se* a valid justification for a Chapter 11 filing; rather, it is a consequential benefit of an otherwise good faith filing. A perceived need for the automatic stay, without more, cannot convert a bad faith filing to a good faith one. *In re Herndon Executive Center, Inc.*, 36 B.R. 803, 806 (Bankr. M.D. Fla. 1984). Similarly, it has been held that Chapter 11 petitions filed merely to take advantage of other singular provisions of the Bankruptcy Code are improper and may be dismissed as not . . .

* * *

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* * *

ORDER

Based on all the foregoing, it is ORDERED, ADJUDGED AND DECREED that the motion to dismiss the above-captioned Chapter 11 cases filed by JEA Boxing Company, Inc. and Pine Hill Investments, Inc. d/b/a Houston Boxing Association be, and hereby is, granted; and it is further

ORERED, ADJUDGED AND DECREED that the Chapter 11 cases of HBA East, Inc., Round One Productions, Inc. and Jeffrey D. Levine be, and the same hereby are, dismissed.

Dated: Brooklyn, New York

June 3, 1988

By: /s/ JEROME FELLER

Jerome Feller

United States Bankruptcy Judge

APPENDIX B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

ROUND ONE PRODUCTION, INC.,
and HBA EAST, INC.,
Plaintiffs,

against

JOSEPHINE ABERCROMBIE, HOUSTON BOXING ASSOCIATION, INC., HBA, INC., STANLEY HOFFMAN, and RONALD KATZ,
Defendants.

Index No. IAS Part 11915

NOTICE OF MOTION

PLEASE TAKE NOTICE, that upon the affirmation of Brian M. Cogan, dated July 14, 1988, and the exihibts annexed thereto, defendants will move this Court, before an IAS Part thereof, to be held at the Supreme Court Building, Mineola, New York, on the 27th day of July, 1988, at 9:30 a.m., or as soon thereafter as counsel may be heard, for an Order: (1) pursuant to CPLR 3211 (a)(4), dismissing this action, on the ground that a prior action is and has been pending between these parties in the Texas State Courts since March 3, 1987; (2) pursurant to CPLR 3211(a)(7), dismissing the complaint for failure to state a cause of action; and (3) for such other and further relief as the Court deems proper.

PLEASE TAKE FURTHER NOTICE, that any answering papers shall be served so as to be received by the undersigned no later than seven (7) days before the return date of the motion.

Dated: Mineola, New York
July 15, 1988

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TO: MICHAEL M. PERLMAN, ESQ.
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

ROUND ONE PRODUCTION, INC.,
and HBA EAST, INC.,
Plaintiffs,

against

JOSEPHINE ABERCROMBIE, HOUSTON BOXING ASSOCIATION, INC., HBA, INC., STANLEY HOFFMAN, and RONALD KATZ,
Defendants.

Index No. IAS Part_____

AFFIRMATION

BRIAN M. COGAN, an attorney admitted to practice before the Courts of this State, affirms the following to be true, under penalties of perjury:

1. I am a member of the firm of Stroock & Stroock & Lavan, which along with the firm of Meyer, Suozzi, English and Klein, is co-counsel for defendants. I make this affirmation in support of defendants' motion to dismiss this action: (1) pursuant to CPLR 3211(a)(4) on the ground that there is and has been a prior action pending between these same parties over the same dispute in the Texas State Courts (the "Texas Action") since March 3, 1987; and (2) pursuant ot CPLR 3211(a)(7) for failure to state a cause of action. As will be shown below, this case represents the plaintiffs' fourth attempt to shift the forum for this dispute out of the Texas State Court and to some other court. Every other court that has considered the plaintiffs' efforts has rejected those attempts; we respectfully submit that this Court should do the same.

BACKGROUND

2. The facts relevant to this case are fully set forth in the Decision of the Hon. Jerome Feller of the United States Bankruptcy Court for the Eastern District of New York, entered on June 3, 1988 (the "Bankruptcy Decision"), in bankruptcy cases entitled *in re HBA East, Inc., Round One Productions, Inc. and Jeffrey D. Levine,* a copy of which is included as Exhibit 1 in the documentary supplement ("Doc. Supp.") submitted herewith. As will be explained below, these were voluntary Chapter 11 bankruptcy cases filed by the plaintiffs herein in an attempt to avoid having this dispute determined in the Texas State Courts. Judge Feller rejected the plaintiffs' strategy, finding they had undertaken it in bad faith, and in so doing, made extensive findings of facts and conclusions of law concerning the dispute between these parties.

3. To summarize Judge Feller's Decision, this dispute arises from the hostile dissolution of the business relationship between the parties. The defendants consist of Josephine E. Abercrombie, a Texas resident, and Houston Boxing Association, Inc., also known as HBA, Inc., a Texas corporation of which Josephine Abercrombie is the sole shareholder.[1] The other individual defendants, Stanley Hoffman and Ronald Katz, are employees of HBA, Inc. The plaintiffs consist of HBA East, Inc. and Round One

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1. As shown below, two affiliated Abercrombie Texas corporations, JEA Boxing Company, Inc. ("JEA Boxing") and Pine Hill Investments, Inc. d/b/a Houston Boxing Association, acted together in their partnership with the plaintiff corporations herein. In order to facilitate cross-references between the Bankruptcy Court proceedings, the Texas State Court proceedings, and the instant case, Mrs. Abercrombie, Pine Hill, and JEA Boxing will be referred to as "JEA" throughout this motion.

Productions, Inc., two shell corporations of which Jeffrey D. Levine is the sole shareholder and officer.[2] (Bankruptcy Decision at 3).

4. Levine approached Abercrombie in or about October, 1984, and initiated discussions about a partnership in the boxing promotion business. (Bankruptcy Decision at 5). Prior to his meeting Abercrombie, Levine's forays into the boxing business had failed, and his business, conducted through other shell corporations, was "tottering on the brink of financial collapse." *Id.* Through various representations, Levine persuaded Abercrombie, through JEA and Pine Hill, to finance a partnership between them, and JEA and Pine Hill eventually funnelled $1.2 million to Levine. *Id.* at 5-7. The agreement was that JEA would supply the funding for the partnership, and Levine would do the day-to-day activities of the partnership in New York and New Jersey.

5. Levine left it to JEA to determine the legal form of their business relationship. *Id.* at 6. The parties thereafter executed a Limited Partnership Agreement—containing an express Texas choice-of-law clause (¶ 16.02 thereof)— which confirmed and ratified the arrangement that they had agreed to more than one year earlier.[3] Levine formed the plaintiff "HBA East, Inc.", taking the name from Abercrombie's pre-existing business in Texas (*i.e.*, Houston Boxing Association) in order to capitalize

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2. Since Judge Feller found that Levine's corporations are virtual shells and Levine's alter egos, the plaintiffs will be referred to herein as "Levine."

3. A copy of the limited partnership agreement is annexed to JEA's complaint in the Texas State Court (known as a "petition" under Texas practice) as Exhibit A thereto. JEA's Texas complaint is included in the documentary supplement as Exhibit 2, and is referred to herein as the "Texas Complaint".

on the reputation that Houston Boxing Association had already acquired in the industry. Under the terms of the Limited Partnership Agreement and its amended version,[4] HBA East, Inc., became the managing general partner of the limited partnership, which was called "HBA East, Ltd." One of Abercrombie's corporations, Pine Hill, was a limited partner, and another Abercrombie corporation, JEA Boxing, was a general partner. *Id.* at 6-7. However, § 7.05 of the amended limited partnership agreement further provided that if Levine or his entities breached the agreement, then

> [JEA] shall have the right, exercisable by written notice . . . to convert the interest of the Managing Partner [HBA East, Inc.] in the Partnership from a general partner interest to a limited partner interest in the Partnership. Such conversion shall . . . preclude the Managing Partner from any further control in the management and control of the Partnership.

Doc. Supp. Exhibit 3, Exhibit B thereto at 16.

6. Despite over $1.2 million supplied by JEA to Levine and hundreds of thousands of dollars more which Levine had taken into the business, Levine always operated the venture at a loss. Bankruptcy Decision at 12. More importantly, although he was using the money to pay his personal expenses, he refused repeated requests to account for any of the moneys provided by JEA. The partnership collapsed in early 1987 when JEA learned that, instead of obtaining promotion contracts in the name of the limited partnership (HBA East, Ltd.), Levine

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4. A copy of the amended limited partnership agreement is annexed to JEA's complaint in the "adversary proceedings" (*see infra* ¶ 11) as Exhibit B thereto. JEA's complaint in the adversary proceeding is included in the documentary supplement as Exhibit 3.

had put all the contracts except one—the Carl Williams contract—in the name of his own corporation, HBA East, Inc. The Carl Williams contract was put in Levine's other corporation, Round One Production. Levine had thus used JEA's funds to usurp for himself what were to have been partnership opportunities. Texas Complaint at 6-9.

7. JEA thereupon terminated all further funding. Bankruptcy Decision at 8. It also invoked § 7.05 of the amended limited partnership agreement, thereby converting Levine's interest in the limited partnership to that of a limited, non-participatory partner, and began dissolution and winding up of the partnership. *Id.*

8. On March 3, 1987, with Levine having still failed to account for the disappearance of the $1.2 million and the substantial additional funds he had received, and having failed to explain why the contracts had been placed in the name of HBA East, Inc. or Round One instead of the limited partnership, JEA commenced litigation against Levine and his entities in Texas State Court. *See* Doc. Supp. Exhibit 2. Levine was sued for, *inter alia*, breach of contract, breach of fiduciary duty, usurpation of partnership opportunities, and fraud, and a constructive trust and receiver were sought to assert control over the boxing contracts which Levine had wrongfully placed in the name of his own corporations, and whatever portion of the funds he had not dissipated.

LEVINE'S FIRST ATTEMPT TO AVOID TEXAS

9. On March 27, 1987—just days before he was required to answer the complaint in Texas—Levine and his entities filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code in the United States Bank-

ruptcy Court for the Eastern District of New York. Chapter 11 is not a liquidation statute, but a reorganization statute, whereby a debtor is left in full control of his business so that, in theory, he can pay off his debts by continuing the business. Levine contended in his petition that he had filed bankruptcy because of a need to "reorganize" his business by avoiding the Texas Action. Bankruptcy Decision at 20, 29.

10. As Levine had fully intended, the filing of the bankruptcy petitions brought an immediate halt to the Texas Action. This is because 11 U.S.C. § 362, the "automatic stay" provision of the federal Bankruptcy Code, operates as an injunction against all creditors from continuing any lawsuit against the Chapter 11 debtor. Under this federal law, any proceedings which JEA continued against Levine outside of Bankruptcy Court would not only have been null and void, but contemptuous. *Id.* at 3.

11. Faced with the automatic stay of the Texas Action, JEA took several actions to try to assert its rights against Levine, find out what he had done with the $1.2 million and the substantial additional funds he had received, and obtain possession of the boxing contracts that had wrongfully been put in the name of HBA East, Inc. or Round One. First, JEA commenced what is known as an "adversary proceeding" in the Bankruptcy Court. This is a lawsuit within the Chapter 11 bankruptcy case, and the usual federal rules for discovery, motion practice, and trial apply. (A copy of the complaint in the adversary proceeding, which is substantially the same as the Complaint in the Texas Action, is included in the documentary supplement as Exhibit 3). Levine and his entities served an Answer and Counterclaims in the adversary proceeding (a copy of which is included in the documentary

supplement as Exhibit 4), asserting essentially the same claims of "interference" which they assert in the instant case.

12. Second, shortly after commencing the adversary proceeding, JEA filed a motion to dismiss the entire bankruptcy cases on the ground that since Levine had no business to reorganize, the bankruptcy petitions were filed in bad faith; Levine was merely trying to avoid answering the complaint in the Texas Action and thereby shift the forum of that action from Texas to New York. Bankruptcy Decision at 9.

13. Third, Abercrombie formed another Texas corporation, Houston Boxing Association, Inc., for the purpose of having, as she sought from Levine, a New York presence in the boxing business, and hired the defendants Hoffman and Katz to conduct that business in New York. *Id.* at 6.

14. When he received the motion to dismiss, Judge Feller ordered a stay of the adversary proceeding, reasoning that there would be no point in hearing the lawsuit if he was going to dismiss the entire Chapter 11 case. After hearing all of the evidence, on June 3, 1988, Judge Feller entered his Decision and Order on Motion to Dismiss Chapter 11 Cases (Doc. Supp. Exhibit 1). Finding that Levine had acted in bad faith in filing for bankruptcy, he dismissed the cases outright:

> In essence, these Chapter 11 cases involve little more than a private two-party dispute.
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> * * *
>
> The filing of the Debtors' Chapter 11 petitions on March 27, 1987 was strategically timed and calibrated to events in Texas. . . . By filing on the eve

> of their answering date in the Texas Action and not before, the Debtors were able to use the automatic stay as a sword to avoid appearing in that lawsuit, and were able to shift the forum of their disputes with Movants to this Court, a forum they believed might be more favorable to their plight. As a general rule where, as here, the timing of a filing of a Chapter 11 petition is such that there can be no doubt that the primary, if not sole, purpose of the filing was a litigation tactic, the petition may be dismissed as not being filed in good faith.
>
> * * *
>
> Where, as here, the totality of the circumstances rise to a level of egregiousness compelling a conclusion that the reorganization process is being perverted, we are constrained to dismiss the Chapter 11 petitions as not being filed and maintained in good faith.

Bankruptcy Decision at 22, 24, 29 (footnote omitted). Thus, Levine's initial attempt to avoid the Texas action was decisively rejected.[5]

LEVINE'S OTHER ATTEMPTS TO AVOID TEXAS

15. Despite the condemnation of Levine's tactics by Judge Feller, Levine remained intent on avoiding the Texas Action at all costs. On June 17, 1988, Levine made a motion to Judge Feller, asking him to transfer the adversary proceeding to the United States District Court for the Eastern District of New York as part of his Order

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5. Upon Judge Feller's dismissal of the bankruptcy cases, JEA filed an amended complaint in the state court action. The amended complaint, a copy of which is included in the documentary supplement as Exhibit 5, is essentially the same as the original complaint, except it incorporates the events that transpired in the bankruptcy cases.

dismissing the Chapter 11 cases. Judge Feller wasted no time with this frivolous request; six days later, upon hearing oral argument, Judge Feller orally denied the motion in terms equally clear to his initial decision dismissing the cases:

> [T]his Court is unaware of any authority for the proposition that this Bankruptcy Court, which is an inferior, subordinate unit of the United States District Court for the Eastern District of New York, has the power to transfer the litigation to the District Court. . . .
>
> Now, the former debtors here claim or assert and argue fairness, administrative convenience, [and] convenience of the parties to persuade this Court that the . . . case should be transferred to the District Court, assuming, such a transfer can be effectuated by this Court. . . .
>
> [B]ut the debtors seem to forget that these Chapter 11 cases were found to be a misuse and abuse of the bankruptcy reorganization process and were required to be dismissed as not being filed in good faith. . . .

Transcript of Proceedings dated June 23, 1988 at 17, 18, 20 (relevant portions appear in the documentary supplement as Exhibit 6).

16. Levine became yet more desperate, and his legal maneuvering more absurd. On June 29, 1988, six days after being again reprimanded by Judge Feller, Levine filed a Petition for Removal of the Texas Action to the United States District Court for the Southern District of Texas. The very next day, Judge Lynn N. Hughes of that court remanded the case to Texas State Court, finding that the case was not removable and that Levine had

again attempted to forum shop in bad faith.[6] (A copy of the Order of Remand appears in the documentary supplement as Exhibit 7).

THE INSTANT CASE INVOLVES SUBSTANTIALLY THE SAME PARTIES AND ISSUES AS THE TEXAS ACTION

17. On June 30, 1988—one day after having been rejected by Judge Hughes—Levine commenced the instant action.[7] (A copy of the Summons and Complaint appears in the documentary supplement as Exhibit 9). Levine has clearly commenced this action for the purpose of pre-empting the previously obtained jurisdiction of the Texas State Court. However, Levine's latest attempt to avoid the Texas Action can fare no better than his earlier efforts. CPLR 3211(a)(4) provides that, under

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6. During the pendency of the bankruptcy cases, Judge Feller had ordered Levine to create an escrow fund, which he could not invade, in order to protect JEA in the event the bankruptcy cases were dismissed. When Levine improperly attempted to remove the Texas state court action to Texas federal court, federal Judge Hughes ordered Levine to transfer the fund to the Clerk of the Court in Texas to await disposition of the litigation there. Levine refused, and in another demonstration of his willingness to abuse the judicial system, ordered his attorneys to commence an interpleader action in the United States District Court for the Southern District of New York. Only after Judge Hughes threatened to hold Levine and his attorneys in contempt when they failed to comply with his order did Levine and his attorneys transfer the escrow fund to Texas, where it currently remains. (A copy of the transcript of proceedings before Judge Hughes appears in the documentary supplement as Exhibit 8).

7. Although Levine's complaint in this case was served (improperly) on June 30, 1988, the summons is dated June 29, 1988—the same day on which Levine's lawyers were arguing unsuccessfully before Judge Hughes that he should keep the case in Texas federal court.

these circumstances, the Supreme Court should dismiss this action on the ground that a prior similar action is pending.

18. The claims raised by Levine herein are the same claims he raised as counterclaims in the adversary proceeding, and the claims that JEA will raise as counterclaims herein are the same as are already pending in Texas. The parties' claims are opposite sides of the same coin.

19. Specifically, the crux of Levine's complaint in the instant case is the same as his claims in the bankruptcy adversary proceeding—that JEA has "interfered" with contracts that belong to HBA East, Inc. and Round One Productions, Inc. However, Levine and his corporations have already been sued in Texas over one year ago for, *inter alia,* a determination that those contracts do not even belong to HBA East, inc., but to JEA and Pine Hill, as the sole general partners under the limited partnership agreement which Levine and his entities breached. Obviously, the issue of whether Levine can state a cause of action for tortious interference with contract is entirely dependent upon whether he or his corporations have any rights with regard to those contracts—issues upon which JEA has sued over one year ago.

20. If JEA is compelled to answer Levine's latest complaint, the claims raised in JEA's complaint now pending in Texas will necessarily be raised as counterclaims. As in the pending Texas Action, JEA will counterclaim that HBA East, Inc., as managing partner of HBA East, Ltd., was restricted from engaging in any business activity in competition with the business activities of the partnership and from diverting to himself partnership

opportunities, and that, consequently, all of the business transactions that Levine entered into in the field of boxing promotions were for the benefit and belong solely to the limited partnership. Similarly, JEA will defend against Levine's claims here by showing that it could not be liable for intereference with contracts which JEA, and not Levine, had the contractual right to control. This is the same showing JEA will make to support its claims in Texas. In fact, all of the issues raised by both sides—*e.g.*, who breached the relationship, was the limited partnership agreement valid, did either side usurp business opportunities that belonged to the other or to the joint venture, and Levine's use of partnership funds—arise out of the hostile dissolution of their business relationship, and are or will be necessarily raised in both the Texas Action and the instant action. Moreover, the evidence before Judge Feller was undisputed that the docket of the Texas State Court will permit this action to be tried in less than six months.

21. The law is clear that the legal and factual issues surrounding the dissolution of the parties' relationship should not be simultaneously determined in two forums. As shown in the accompanying memorandum of law, CPLR 3211(a)(4) provides that a second-filed action may be dismissed in order to avoid forum shopping and duplicative litigation. The New York courts have been steadfast in refusing to permit duplicative litigation and in relegating parties to the forum where the action was first commenced.

22. I respectfully submit that there is absolutely no basis for permitting Levine to engage in duplicative litigation or to avoid the forum where this dispute was first filed. Under well-established law this Court should dis-

miss the instant action on the ground that a prior action is pending, and for failure to state a cause of action.

Dated: New York, New York
July 14, 1988

By: /s/ BRIAN M. COGAN
Brian M. Cogan

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK)
)ss.:
COUNTY OF NASSAU)

Todd Goodman, being duly sworn deposes and says, that deponent is not a party to the within action, is over 18 years of age and resides at Long Beach, New York, Nassau County.

On the 15th day of July, 1988, deponent served a copy of the Notice of Motion with affirmation upon:

Michael M. Perlman, Esq.
Attorney for Plaintiffs
585 Stewart Avenue
Garden City, New York 11530

By delivering a true copy thereof to him personally.

/s/ TODD GOODMAN
Todd Goodman

Sworn to before me this
15th day of July, 1988.
/s/ JANICE ENRIGHT
Notary Public

COUNTY CLERK'S OFFICE, §
STATE OF NEW YORK §ss.:
COUNTY OF NASSAU §

I, Harold W. McConnel, Clerk of the County of Nassau and of the Supreme and County Courts, Courts of Record, do hereby certify that I have compared the annexed with the original Notice of Motion filed in my office 12-20-88 and that the same is a true transcript thereof, and of the whole of such original.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County and Court May 2, 1989.

/s/ Harold W. McConnell, Clerk

MEMORANDUM DECISION

SUPREME COURT, NASSAU COUNTY, IAS PART 18

BY: BRUCIA, JAMES J.

DATE: November 4, 1988
INDEX NO. 11915/88

ROUND ONE PRODUCTION, INC.,
and HBA EAST, INC.,
Plaintiffs,

- against -

JOSEPHINE ABERCROMBIE, HOUSTON BOXING ASSOCIATION, INC., HBA, INC., STANLEY HOFFMAN, and RONALD KATZ,
Defendants.

MICHAEL M. PERLMAN, ESQ.
Attorney for Plaintiff
585 Stewart Avenue
Garden City, New York 11530

STROOCK, STROOCK & LAVAN, ESQS.
Atty. for Defendants
7 Hanover Square
New York, N.Y. 10004-2594

MEYER, SUOZZI, ENGLISH & KLEIN, P.C.
Atty. for Defendants
1505 Kellum Place
Mineola, New York 11501

This motion by defendants for an order pursuant to CPLR 3211(a)(4) and (7) dismissing the within action is granted in accordance herewith.

I.

Defendants move pursuant to CPLR 3211(a)(4) seeking to dismiss the action in this Court by reason of a prior pending Texas Court action. In essence, the Texas action involves a proceeding by Pine Hill Investments, Inc., a limited partner of a Texas Limited Partnership, known as HBA East, Ltd., against 1) its general managing partner, HBA East, Inc. of Garden City, New York (a New York plaintiff), for an accounting and appointment of a receiver and 2) against Levine and his corporations (including both New York plaintiffs) to recover damages and lost profits by reason of contract breaches, fraud and self dealing. The complaint in this New York Court action seeks damages for 1) wrongful interference with a contract between Round One Production, Inc. and Carl Williams and (2) wrongful interference with a contract between HBA East, Inc. and Vincent Bergese, Tony Martin, Tony Tucker and (3) other unlawful interference with further contractual relationships or business opportunities involving the use of their professional services.

It is conceded that one of the claims in the Texas Court action alleges that the Texas Limited Partnership is entitled to those fighter promotion contracts and business opportunities which form the basis of the New York actions (see affirmation of counsel for plaintiffs dated August 3, 1988, p. 6). Likewise, it is uncontroverted that the New York plaintiffs are named defendants in the Texas action and the New York defendants are closely

affiliated with the Texas plaintiffs (New York defendant Abercrombie is apparently a principal of the Texas plaintiffs as well as sole shareholder of the corporate New York defendant, which, in turn employs the two remaining New York defendants). Thus, while there may not be complete identity of the parties and causes of action in the two actions, there is substantial identity sufficient to satisfy the requirements of CPLR 3211(a)(4) (see *Karen-Di Resta Construction Co., Inc. v. Albert B. Ashforth, Inc.*, 100 AD2d 760). While the court has considered staying the New York action pending resolution of the Texas action, since the Texas action will no doubt have collateral estoppel and/or res judicata effect on the New York action (see 4 Weinstein-Korn-Miller, New York Civil Practice, ¶ 3211.24, p. 32-84), in the interest of judicial economy an outright dismissal appears warranted conditioned upon a waiver by the New York defendants of any jurisdictional objections or statute of limitations objections to being added to the Texas action (Ibid. at pp. 32-85 to 32-87). If they be so advised, the New York plaintiffs shall act within ninety (90) days of service upon them of a copy of the order to be settled herein to add the New York defendants to the Texas action through the assertion of any appropriate counterclaims and/or third party claims.

II.

Were this court not dismissing plaintiffs' complaint pursuant to CPLR 3211(a)(4), dismissal would in any event be warranted pursuant to CPLR 3211(a)(7) (although leave to re-plead would be warranted).

The first cause of action seeks damages for wrongfully interfering with the contract between plaintiff, Round One

Productions, Inc. and Carl Williams. The second cause of action seeks damages for wrongfully interfering with contracts between plaintiff HBA East, Inc. and Vincent Burgese, Tony Martin and Tony Tucker. Neither cause of action alleges that the existing contract was breached as a result of defendants' wrongful conduct. (See: 4E NY Cons. Laws Serv. Anno., Subd 55, Forms 1248-1253 at pp. 368-373). Such is a material element of the cause of action for tortious interference with a contract. (See: *Israel v. Wood Dolson Co.,* 1 NY2d 116; *Kaminski v. United Parcel Service,* 120 AD2d 409; *Key Bank v. Lake Placid,* 103 AD2d 19) which must be alleged in specific nonconclusory terms (cf. *Turner Constr. v. Seaboard,* 93 AD2d 88; *Susskind v. Ipco Hospital Supply Corporation,* 49 AD2d 915). The complaint is required "to recite in nonconclusory language facts establishing all the elements of a wrongful and intentional interference with plaintiff's contractual rights". (*Benton v. Kennedy-Von Saun Mfg. Corp.,* 2 AD2d 27, 30).

In addition, each of the causes of the complaint fail to state facts of tortious interference with prospective contractual relations in that the complaint does not allege that *but for* the alleged interference the prospective relationship would have been realized. (See: *Union Car Advertising Co. v. Collier,* 263 N.Y. 398; *Mandelblatt v. Devon Stores,* 132 AD2d 162). While the complaint alleges negotiations, it fails to allege that the negotiations failed but for defendants alleged interference. Thus, no cause of action based upon interference with prospective contractual relations has been set forth. (See: *Susskind v. Ipco Hospital Supply Corporation,* supra; cf. *Williamson, Picket, Gross, Inc. v. 400 Park Avenue Company,* 63 AD2d 880; *Vendall, Inc. v. Statler Manufacturirng Corp.,* 5 AD2d 882, 883).

Settle order on twenty (20) days notice providing for outright dismissal of the within action if the proposed order includes the waiver by the New York defendants referred to infra. Said waiver by the New York defendants shall be annexed to the proposed order to be settled herein. In the event the New York defendants elect not to waive, then the order shall provide for dismissal with leave to replead within twenty (20) after service of a copy of said order on counsel for plaintiffs after which the within action shall be stayed pending determination of the Texas action. Plaintiffs may precipitate an election by the New York defendants by settling their own judgment on notice providing for the dismissal with leave to replead referred to above.

By: /s/ JAMES J. BRUCIA
J.S.C.

Dated: November 4, 1988
Chamber's Date: 11-4-88

COUNTY CLERK'S OFFICE, §
STATE OF NEW YORK § ss.:
COUNTY OF NASSAU §

I, Harold W. McConnell, Clerk of the County of Nassau and of the Supreme and County Courts, Court of Record, do hereby certify that I have compared the annexed with the original Memorandum Decision filed in my office Dec. 20, 1988 and that the same is a true transcript thereof, and of the whole of such original.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County and Court May 2, 1989.

/s/ Harold W. McConnell, Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

ROUND ONE PRODUCTION, INC., and
HBA EAST, INC.,
Plaintiffs,

- against -

JOSEPHINE ABERCROMBIE, HOUSTON BOXING ASSOCIATION, INC., HBA, INC., STANLEY HOFFMAN, and RONALD KATZ,
Defendants.

Index No. 11915/88
(Brucia, J.)

ORDER

Defendants Josephine Abercrombie, Houston Boxing Association, Inc., HBA, Inc., Stanley Hoffman and Ronald Katz having moved this Court for an Order pursuant to CPLR 3241(a)(4) and CPLR 3211(a)(7) dismissing the complaint herein;

NOW, on reading and filing the notice of motion of the defendants, dated July 15, 1988, the affirmation of Brian M. Cogan, dated July 14, 1988 and the exhibits thereto, in support of the defendants' motion; the affirmation of Michael M. Perlman, dated August 3, 1988, and the exhibits thereto, in opposition to the defendants' motion; and the reply affirmation of Brian M. Cogan, dated August 9, 1988, in support of defendants' motion, and due deliberation having been had thereon, and the Court having rendered its memorandum decision dated November 4, 1988,

Now, on motion of Meyer, Suozzi, English & Klein, P.C. and Stroock & Stroock & Lavan, attorneys for the defendants, it is hereby

ORDERED that the motion of defendants Josephine Abercrombie, Houston Boxing Association, Inc., HBA, Inc., Stanley Hoffman and Ronald Katz is granted and the complaint is hereby dismissed with prejudice.

ENTER

By: /s/ JAMES J. BUCIA
J.S.C.

Mineola, N.Y.
Dated: December 19, 1988

COUNTY CLERK'S OFFICE, §
STATE OF NEW YORK, § ss.:
COUNTY OF NASSAU §

I, Harold W. McConnell, Clerk of the County of Nassau and of the Supreme and County Courts, Courts of Record, do hereby certify that I have compared the annexed with the original ORDER FILED & ENTERED in my office December 20, 1988 and that the same is a true transcript thereof, and of the whole of such original.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County and Court May 2, 1989.

/s/ Harold W. McConnell, Clerk

APPENDIX C

H-88-2214

LYNN N. HUGHES

REMANDED TO 157th DISTRICT COURT,
HARRIS COUNTY, 6-30-88

JEA BOXING COMPANY, INC. AND
PINE HILL INVESTMENTS, INC.
D/B/A HOUSTON BOXING ASSOCIATION
Plaintiffs

HBA EAST, LTD., A TEXAS
LIMITED PARTNERSHIP, HBA
EAST, INC., RING NETWORK,
INC., RING SPORTS PROMOTIONS,
INC., ROUND ONE PRODUCTIONS, INC.,
JEFFREY D. LEVINE
Defendants

FUNDS IN REGISTRY

CAUSE
(CITE THE U.S. CIVIL STATUTE UNDER
WHICH THE CASE IS FILED AND
WRITE A BRIEF STATEMENT
OF CAUSE)

28 USC § 1332—contract

Removed from District Court of Harris Cty.

157th J.D. Case #87-10167

ATTORNEYS

H. Dixon Montague, ID #561
VINSON & ELKINS
3200 First City Tower
Houston, Texas 77002-6760

Michael A. Caddell ID #7426
CADDELL & CONWELL
1331 Lamar, Suite 1070
Houston, Texas 77010-3027
(713) 751-0400

TRUE COPY I CERTIFY
ATTEST: JESSE E. CLARK, Clerk

Date	NR	LYNN HUGHES Proceedings
6-27-88	1	PETITION FOR REMOVAL, filed. w/ a) complaint
6-27-88	2	CASH BOND, filed. ($500.00)
6-29-88	3	(LNH) *CONFERENCE MEMORANDUM*, filed. parties ntfd. fs dktd 7/7/88 An order will be entered remanding this case to the 157th District Court, Harris County, Texas. An order will be entered requiring that the $175,000 escrowed funds be deposited in this Court's Registry.
6-29-88	4	(LNH) *ORDER*, filed. parties ntfd. fs. The $175,000 escrowed funds in the adversary proceeding No. 187-0086 *JEA Boxing Company, Inc., et al., v. HBA East, Inc., et al,* in the U.S. Bankruptcy Court of the Eastern District of New York shall be deposited immediately in this Court's registry until a disposition of Cause No. 87-10167 pending in the 157th District Court, Harris County, Texas. dkt'd 7/7/88
6-30-88	5	*ORDER REMANDING THE CASE TO THE 157TH DISTRICT COURT*, filed. parties ntfd. fs dkt'd 7/7/88 dkt'd 7/7/88
6-29-88	6	Pltfs *REQUEST FOR IMMEDIATE HEARING ON PETITION FOR REMOVAL AND REQUEST FOR INJUNCTIVE RELIEF*. filed. fs dkt'd 7/7/88
6-29-88	7	Pltfs *RESPONSE* to Petition for Removal and Request to Remand to State District Court and for Sanctions pursuant to Rule 11 and for Supplemental or alternative injunctive relief. filed. fs dkt'd 7/7/88

Date	NR	LYNN HUGHES Proceedings
7-01-88	8	Pltfs' *MOTION FOR CONTEMPT AND FOR SANCTIONS.* filed. fs dkt'd 7/7/88
7-05-88	9	(LNH) *ORDER TO SHOW CAUSE.* filed. parties ntfd. by mail 7-05-88. fs All Defts named in order are ordered to appear and show cause why they should not be held in contempt of court for failure to comply with this court's Jun 29, 1988 order. Hearing will be: Jul 8, 88, 11 am, Ctrm #7, 11th fl. dkt'd 7/7/88
7-07-88	10	Defts *RESPONSE* to Order to Show Cause. filed. fs dkt'd 7-13-88
7-08-88	11	Non-Party Kaye Scholer *OPPOSITION* to Motion for Contempt and for Sanctions. filed. fs dkt'd 7-13-88
7-08-88	12	Non-Party Kaye Scholer *MOTION FOR RELIEF FROM ORDER.* filed. fs M/D 8/1/88 Dkt'd 7-13-88 br
7-11-88	13	Courtreporter's *TRANSCRIPT* of proceeding held before the Honorable Lynn N. Hughes on Jul. 8, 1988, filed. Dkt'd 7-12-88 br
7-8-88	14	(LNH) *CONTEMPT HEARING,* filed. (Rptr: Fred Warner) Appearances: S. Little & D. Montague—Plft; R. Steoube K. Scholer, F. Hays & Handler Michael Caddell & L. McDonald—defts; K. Scholer, Firman, Hays & Handler has represented that it will deposit the escroed funds in this Court's registry pursuant to this court's Jun. 29, 1988 order. $2,500 atty fees will be assessed as costs; K. Scholer is assessed $1,250 of this amount & the

Date NR LYNN HUGHES Proceedings

defts will be assessed the remaining $1,-250. Plfts will submit order.

Dkt'd 7-18-88 br

7-19-88 15 (LNH) *AMENDED DEPOSIT ORDER*, filed. Parties ntfd. The $175,00 escrowed funds related to the adversary proceedings 187-0086 in the Court in the U.S. Bankruptcy Court of the Eastern district of New York, shall be deposited by Kay, Scholer, Fierman, Hays & Handler immediately in this court's registry f/disposition through 87-10167 pending in the 157th District Court, harris County, Texas. Dkt'd 7-18-88 br

7-19-88 16 (LNH) *JUDGMENT ON CONTEMPT*, filed, Parties ntfd.

1. Respondents, having purged themselves of contempt of court by the conclusion of the hearing, are adjudged liable f/portion of the movant's atty's fees.
2. HBA East, Ltd, HBa East, Inc., Ring Network, Inc., Ring Sports Promotions Inc., Roung One Productions, Inc. & J. D. Levine, jointly & severally, shall pay immediately to JEA Boxing Company, Inc., & Pine Hill Investments, Inc. $1,250; & Kaye, Scholer, Fierman, Hays & Handler shall pay immediately to JEA Boxing Company, Inc. & Pine Hill Investments, Inc., $1,250.

Dkt'd 7-22-88 br

Date	NR	LYNN HUGHES	Proceedings
-11-89	17	(NWB) *ORDER*, entered. Parties ntfd. Ordered that the $175,000, plus all accumulated interest thereon deposited in the Registry of this Court be transferred to the Registry of the 157th Judicial Dist. Court of Harris County, TX under Cause No. 87-010167. kg	
-11-89		Copies of the above order to: Finance, Operations Mgr. kg	

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-88-2214

IN RE: JEA BOXING COMPANY, INC., et al.,
PLAINTIFFS

v.

HBA EAST, LTD., et al.,
DEFENDANTS

OPPOSITION TO MOTION FOR CONTEMPT
AND FOR SANCTIONS

To the Honorable Lynn N. Hughes, United States District Judge:

This opposition is filed on behalf of Kaye, Scholer, Fierman, Hays & Handler ("Kaye Scholer") by its counsel, Akin, Gump, Strauss, Hauer & Feld. Although Kaye Scholer is not a party or an attorney-or-record in the above-entitled and numbered cause of action, it is responding to the Plaintiffs' motion for the reason that relief is requested against Kaye Scholer. In support of this opposition, Kaye Scholer states the following:

1. The relief sought in Plaintiffs' Motion for Contempt and Sanctions cannot be granted by this Court because this Court lacks jurisdiction over the parties and the subject matter. This Court has remanded this case to the 157th Judicial District Court for Harris County, Texas, and, as a result thereof, has been completely divested of

jurisdiction over the case. Moreover, this Court does not have personal jurisdiction over Kaye Scholer with respect to the matters made the subject of Plaintiffs' motion.

2. By Prior Order, this case was remanded to the 157th Judicial District Court for Harris County, Texas, on the ground that this Court lacked subject matter jurisdiction over the case. This Court's remand completely divested the Court of all jurisdiction over the case and all matters therein. *Browning v. Navarro,* 743 F.2d 1069, 1078 (5th Cir. 1984) *reh'g denied,* 747 F.2d 1465. Therein, the Court of Appeals stated "it is axiomatic that remanding a case to state court terminates the jurisdiction of a federal bankruptcy or district court over the case." *Id. See, also In re Providencia Devel. Corp.,* 406 F.2d 251, 253 (1st Cir. 1969).

3. The Plaintiffs' proposed form of "Contempt Order" submitted along with its Motion for Contempt and Sanctions recognizes that a substantial jurisdictional problem exists. Although not requested in this motion, the Plaintiffs have inserted a paragraph in the so-called Contempt Order amending this Court's June 29, 1988 Order, although no cause is stated in the motion for such amendment. Specifically, the Contempt Order proposes to find that "in order to assume compliance of this Court's June 29, 1988 Order, it is necessary to amend its June 30, 1988 Order of remand to retain jurisdiction to assure compliance with its June 29, 1988 Order." Plaintiffs recognize that this Court has been divested of jurisdiction by its prior order. The proposed order goes further and provides for such amendment. Such order is not in compliance with any applicable Rules of Civil Procedure.

* * *

[4]

* * *

. . . to Kaye Scholer's Motion for Relief From Order which is filed contemporaneously with this opposition). The Federal Court in New York does have jurisdiction over the interpleader action pursuant to 28 U.S.C. § 1335. It has jurisdiction over the parties and can adjudicate entitlement to the funds. Therefore, the rights of the parties, including the Plaintiffs, are fully protected by the existence of the interpleader action.

7. Further, and without waiving the foregoing, Kaye Scholer asserts that it cannot be held in contempt of the June 29, 1988 Order. No term or provision of the June 29, 1988 Order is sufficiently specific with respect to Kaye Scholer or either civil or criminal contempt to be found.

8. For the foregoing reasons, Plaintiffs' motion cannot be considered by this Court and should be dismissed. Alternatively, if the Court does consider Plaintiffs' motions, the relief with respect to Kaye Scholer should be denied in all respects.

Respectfully submitted this 8th day of July, 1988.

KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER

By: /s/ H. REY STROUBE, III
H. Rey Stroube, III
Admissions No. 4673
Akin, Gump, Strauss, Hauer
& Feld
3200 RepublicBank Center
Houston, Texas 77002
(713) 221-0101

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. NO. H-88-2214

JEA BOXING COMPANY, INC., et al.,
Plaintiffs,

v.

HBA EAST, LTD., et al.
Defendants.

RESPONSE TO ORDER TO SHOW CAUSE

COMES NOW, HBA East, Inc., Ring Network, Inc., Ring Sports Promotions, Inc., Round One Production, Inc. and Jeffrey D. Levine, Defendants in the above-entitled and numbered cause of action and makes this their Response to the Court's Order to Show Cause why they should not be held in contempt of court for failure to comply with this Court's June 29, 1988, Order and would show as follows:

I.

The Escrow Account

1.1 On June 29, 1988, this Court signed an order that $175,000.00 of escrowed funds (the "Escrowed Funds") in Adversary Proceeding No. 187-0086, *JEA Boxing Company, Inc., et al v. HBA East, Inc., et al,* In the United States Bankruptcy Court of the Eastern District of New York (the "Bankruptcy Proceeding"), be deposited immediately into this Court's Registry.

* * *

[4-5]

* * *

IV.

Lack of Federal Jurisdiction

4.1 The attempted removal of this action was based upon diversity of citizenship under Title 28 U.S.C. § 1441. When such an attempted removal occurs, the District Court's jurisdiction is limited to a determination of its own jurisdiction and the power to remand the action to the State Court if it appears that the action was removed improvidently and without jurisdiction. *Smith v. Dealers Transit Inc.*, 239 F.Supp. 605 (E.D. N.D. Tenn. 1965). In the *Smith* case, the Court held, on facts similar to our own, that since the necessary allegations as to diversity of citizenship between the parties did not appear from the respective records before the Court, that the Court had no jurisdiction to take any action other than a remand of the case back to State Court. *Smith* at 607.

4.2 In an earlier opinion, a South Carolina District Court held that:

> Unless the case has been properly removed, this Court has no jurisdiction to decide other questions.

Hensley v. Green, 36 F.Supp. 671, 672 (W.D. S.C. 1940).

4.3 Essentially, a District Court can not gain jurisdiction over an action unless there is some basis under 28 U.S.C. §§ 1441-1452. There is no basis in this case for Federal jurisdiction under the appropriate sections. Therefore, the Court's only power is to remand the case for determination in the appropriate forum. It is beyond

the jurisdictional powers of this Court to enter an order for the transfer of funds because such an order is beyond the scope of its narrow jurisdictional power to remand a case upon which no Federal jurisdiction lies.

WHEREFORE, PREMISES CONSIDERED, Defendants Jeffrey D. Levine, HBA East, Inc., Ring Network, Inc., Ring Sports Promotions, Inc. and Round One Productions, Inc. respectfully request this Court to find them not in contempt of Court for failure to comply with the Court's June 29, 1988, Order.

Respectfully submitted,

CADDELL & CONWELL

By: /s/ LESLIE McDONNELL
Michael A. Caddell
Federal ID No. 7426

Leslie McDonnell
Federal ID No. 9136

The Park in Houston Center
1331 Lamar, Suite 1070
Houston, Texas 77010
(713) 751-0400

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response to Show Cause Order has been forwarded to all counsel of record via certified mail, return receipt requested, on this 7th day of July, 1988.

By: /s/ LESLIE McDONNELL
Leslie McDonnell

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. NO. H-88-2214

Houston, Texas, July 8, 1988, 8:30 a.m.

JEA BOXING COMPANY, INC., AND PINE HILL INVESTMENTS, INC., D/B/A HOUSTON BOXING ASSOCIATION

Versus

HBA EAST, LTD, A TEXAS LIMITED PARTNERSHIP, et al.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE LYNN N. HUGHES
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	Mr. H. Dixon Montague Vinson & Elkins 3200 First City Tower Houston, Texas 77002
For Kaye-Scholer:	Mr. Rey Stroube Akin, Gump, Strauss, Haver & Feld 700 Louisiana Houston, Texas 77002
For Jeffrey Levine:	Mr. Michael A. Caddell Ms. Leslie McDonnell Caddell & Conwell 1331 Lamar, Suite 1070 Houston, Texas 77010
Court Reporter:	Fred Warner 515 Rusk Avenue Houston, Texas 77002

Proceedings recorded by mechanical stenograph, produced by computer-aided transcription.

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[14-15]

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[Mr. Caddell:]
removal was something, that the sole reason for the removal was not to allow disbursal of the funds at 5:00 o'clock on Wednesday.

If you remember, on Wednesday when we discussed this matter, I represented that I was certain that the Kaye-Scholer firm would not make a disbursement if you simply told them to hold onto the fund, that they had complied with the Court's order in New York and they had not disbursed funds.

I was only distressed after you spoke on the telephone with Mr. Steinberg and advised him to send the funds from New York to Texas.

What drives the defendants in New York, I believe, the clients in New York is a fear, frankly, of being in Texas state court. I don't believe that is a reasonable fear. I don't know that it's rational, but they would like to take advantage of the opportunity to be in federal court afforded them by the constitution. They believe that the diversity jurisdiction exists.

I researched it and, frankly, Judge, I still believe diversity jurisdiction exists. I believe HBA East Ltd. is a sham defendant.

THE COURT: I listened to all that at some length on Wednesday.

MR. CADDELL: I understand.

have I?

THE COURT: I haven't signed the remand order.

MR. CADDELL: Yes. You signed it June 30, which remanded the case to state court.

Some of the case law we have, I cited 743 fed. 2d 1069, Brown versus Navarro, 1079. I have highlighted what I think are the relevant portions.

MR. MONTAGUE: Do you have a copy of that for me, counsel?

MR. CADDELL: That's my only copy. I don't have a copy for myself now.

The concern I have is the idea of removing the case to federal court is not a new idea. This did not spring forth from Mr. Steinberg's fertile imagination, you know. Monday, the 27th or whatever it was of July—I mean, June, when he got Judge Felder's order saying you have until 5:00 o'clock.

In fact, they had asked Judge Felder to make a decision concerning the ability of the defendants to remove this case from state court to federal court. They wanted very much to be in federal Court.

THE COURT: I can't help if they asked Judge Felder to rule on a remand that hadn't happened that he couldn't rule on in any event. Judge Felder has no order to decide whether a case should be remanded.

MR. CADDELL: Whether it could be removed.

THE COURT: He can't decide. The best he could do is

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[31-32]

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[Mr. Caddell:]
and jurisdiction granted the Federal Court Judge is broad,

very broad. It is not unlimited. We have presented case law to the Court which suggests that this is not the appropriate forum for the Court's order of last Wednesday and this hearing, and while I have seen New York law—

THE COURT: You haven't shown me any authority. I cannot hold a hearing with contumatious behavior on the order of this Court. I am not trying to litigate the underlying merits of the lawsuit.

MR. CADDELL: There is ample authority that failure to obey a void order is not contumatious behavior. An order without jurisdiction is a void order. It is not voidable. It is void.

THE COURT: I had jurisdiction when I offered it, and I am convinced I still have jurisdiction to keep your bandits from running off with the money.

I don't think there is a slightest doubt that I have the authority to freeze control of the race while the bad faith meritless machinations of your clients are returned to their proper home, any more than Judge Felder didn't have authority to keep the money held under his order after he dismissed the bankruptcy.

He knew a skunk when he saw one, and we are just as street wise here as they are in Brooklyn. There is no question that the only reason I entered the extraordinary relief I did is because it became abundantly clear to me in the hearing last Wednesday that your clients and your client now, as an agent for his clients, had no intention of complying without trying to come up with some other gimmick. They don't want to litigate the merits. They are trying to obstinate, run up the expenses.

The partner to whom I talked with at Kaye-Scholer yesterday kept arguing that it really was inconvenient for the defendants to litigate down here. I don't doubt that's true, but that's something that should have been addressed to Judge Salazar, addressed to me during my participation but not approached by saying, that's okay. We cured it. We did what you really wanted, Judge. We filed another lawsuit in New York. That's what you really wanted.

If I had really wanted that I would have said that's what I wanted them to do. I didn't.

I, in person, order Steinberg to deliver the money to the registry of this Court.

Mr. Stroube do you have any evidence that it was not absolutely possible to have been done? Did he have a heart attack and couldn't write the check?

MR. STROUBE: Your Honor, I have talked to two people. One of them was not Mr. Steinberg. I talked to the gentleman who I believe you were talking to yesterday, Mr. Frencaso, not Mr. Steinberg. I don't know the disposiiton of Mr. Steinberg,

* * *

[certification]

* * *

CERTIFICATION

I, FRED WARNER, Official Court Reporter for the United States District Court for the Southern District of Texas, Houston Division, do hereby certify that the foregoing pages 1 thtrough 58 are a true and complete transcript of the proceedings had in the above-styled and numbered cause before the Honorable LYNN N. HUGHES, United States District Judge, on the 8th day of July, 1988.

WITNESS MY OFFICIAL HAND at my office in Houston, Harris County, Texas on this the 11th day of July, A.D. 1988.

By: /s/ FRED WARNER
Fred Warner, CSR
Official Court Reporter

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

July 19, 1988

The Honorable Felix Salazar, Jr.
Judge, 157th District Court
Harris County Civil Courts Building
301 Fannin Street
Houston, Texas 77002

Re: No. 87-010167
157th District Court
Civil Action No. H-88-2214
United States District Court
Southern District of Texas

Dear Judge Salazar:

Now that the case is again fully pending before you, it appears to me that the sensible thing is for me to transfer the $175,000 plus interest I hold in the registry to your registry, subject to all the claims that are eventually asserted.

If you concur, I will sign a disbursement order as soon as I receive a copy of your order authorizing the deposit. If you do not concur, I will abide your disposition of the funds.

With best wishes,

Yours very truly,
By: /s/ LYNN N. HUGHES
Lynn N. Hughes

Copies: Mr. H. Dixon Montague
Mr. H. Rey Stroube, III
Mr. Michael A. Caddell

PLAINTIFF'S EXHIBIT #8

APPENDIX G

THE SUPREME COURT OF TEXAS
P.O. Box 12218 Capitol Station
Austin, Texas 78711

March 27, 1989

TO WHOM IT MAY CONCERN:

I CERTIFY THAT I, Mary M. Wakefield, am custodian of the membership rolls of the Supreme Court of Texas and

I HEREBY CERTIFY THAT according to the records of the Supreme Court of Texas Arthur Steinberg has never been licensed to practice law in Texas.

By: /s/ MARY M. WAKEFIELD
Mary M. Wakefield, Clerk
Supreme Court of Texas

MMW/km

PLAINTIFF'S EXHIBIT #11